

Kurland v Passaretti

2007 NY Slip Op 33751(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0604150/2006

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LELAND DeGRASSE

PRESENT: _____
Justice

PART 25

Index Number : 604150/2006
KURLAND, SCOTT
vs
PASSARETTI, JOHN J.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED
NOV 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

NOV 16 2007



Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
SCOTT KURLAND individually as a shareholder of
KPG, INC., suing derivatively and in the right of and
for the benefit of KPG, INC,

Plaintiff,

-against-

Index No. 604150/06

JOHN J. PASSARETTI, JOHN J. PASSARETTI
ARCHITECT, P. C., STERLING MANAGEMENT,
INC., STERLING INTERIORS GROUP, INC.,
MARK SHAW, JACK GOLD, THOMAS MANGO,
MICHELLE MARRERO and MIN LEE,

Defendants.

-----X

DeGrasse, J.:

Defendants Sterling Management, Inc., Sterling Interiors Group, Inc., Mark Shaw, Jack Gold and Thomas Mango move for an order dismissing the complaint on the grounds that plaintiff lacks the legal capacity to sue and has failed to state a cause of action. Plaintiff, Scott Kurland, and defendant John J. Passaretti are shareholders of KPG, Inc. Kurland brings this derivative action on behalf of the corporation.

Business Corporation Law § 626 © provides that a complaint filed in a derivative action shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the corporation's board or the reason for not making such effort. In the instant complaint, Kurland alleges that demanding action by KPG's board would have been futile because Passaretti, the owner of 50% of its stock, is a defendant who allegedly engaged in the conduct set forth in the

complaint. Specifically, Kurland alleges that Passaretti and movants diverted KPG's business to the Sterling entities which employed or were owned by the individual movants. A demand for board action is futile and excused when a majority of the board of directors is interested in the challenged transaction (*Marx v Akers*, 88 NY2d 189, 200-201 [1996]). Accordingly, Kurland has sufficiently demonstrated that a demand would have been futile.

Movants dispute the legal sufficiency of the first cause of action by which Kurland alleges breach of fiduciary duty. Kurland acknowledges that Mango is the only movant against whom the claim is alleged. Breach of fiduciary duty can be pleaded against Mango to the extent that it relates to conduct which occurred while he was employed by KPG (*see CBS Corp. v Dumsday*, 268 AD2d 350 [2000]). Although movants assert that Mango left KPG's employ on May 15, 2006 it is alleged that he engaged in tortious conduct "starting in May 2006."

The third cause of action, sounding in defamation, is based on a September 15, 2006 email from Mango, as an employee of the Sterling entities, to Calyon, one of KPG's clients. In the email it is stated that KPG has dissolved and that current active projects will be coordinated through Sterling. Plaintiff alleges that Mango and Sterling knew that the statement was false when it was made. As such, defamation has been sufficiently pleaded against Mango and the Sterling entities. An email of the same date from Sterling Management to KPG's clients is equally actionable against Sterling Management to the extent that it states that "current agreements will be assigned to and honored by Sterling Management." Tortious interference with contractual relations is alleged under the fourth cause of action. The tort "requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without

justification, actual breach of the contract, and damages resulting therefrom” (*Fusco v Fusco*, 36 AD3d 589, 591 [2007]). The fourth cause of action is deficient because Kurland has not alleged any of the foregoing elements. Kurland alleges tortious interference with prospective contractual relations under the fifth cause of action. A plaintiff making such a claim must make a showing that:

“(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship” (*Carvel Corp. v Noonan*, 350 F3d 6, 17 [2003]).

The elements of the tort have not been alleged.

Conversion of KPG’s money and tangible assets is sufficiently alleged under the sixth cause of action. The bank account from which \$118,000 of KPG’s money was allegedly withdrawn and shared with movants suffices as a “specific identifiable fund” contemplated by the Court in *Manufacturers Hanover Trust Company v Chemical Bank* (160 AD2d 113 [1990]). The seventh cause of action by which Kurland alleges unjust enrichment is not viable because it is not alleged that KPG rendered services for movants resulting in their unjust enrichment (*see Outrigger Const. Co. v Bank Leumi Trust Co. of New York*, 240 AD2d 382, 384 [1997]). Unfair competition is alleged under the eighth cause of action. The claim requires a showing of either a confidential relation between the parties or a valid agreement to refrain from the alleged unfair competition (*see Ponte and Sons v Am. Fibers Intl.*, 222 AD2d 271 [1995]). Neither has been alleged. Kurland’s ninth cause of action sets forth no basis for the imposition of a constructive trust with respect to movants. The elements of a constructive trust are (1) a

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confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*O'Brien v Dalessandro*, 43 AD3d 1123 [2007]). Such elements are not alleged with respect to movants. *Schneidman v Tollman* (190 AD2d 524 [1993]) is distinguishable because it involved a limited partnership. KPG and movants did not have any similar relationship. Dismissal of the cause of action by which Kurland seeks an accounting would be inappropriate in light of the fact that some of KPG's underlying claims are still viable (*cf. Corwin v Kaufman*, 37 AD2d 838 [1971]).

For the foregoing reasons, the first cause of action (breach of fiduciary duty) is dismissed for failure to state a cause of action except as it relates to Mango's conduct while he was employed by KPG. The third cause of action (defamation) is dismissed for failure to state a cause of action as against Shaw and Gold only. The fourth, fifth, seventh, eighth and ninth causes of action sounding in tortious interference with contractual relations, tortious interference with prospective contractual relations, unjust enrichment, unfair competition and constructive trust are dismissed for failure to state causes of action. The motion is denied with respect to the second (accounting) and sixth (conversion) causes of action. The motion is further denied to the extent that it is based on the ground that Kurland lacks the legal capacity to sue. A preliminary conference shall be conducted on January 28, 2008 at 2:00 p. m.

Dated: November 16, 2007

FILED
NOV 21 2007
J. S. C.
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